

NO. PD-0797-17

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS
AUSTIN, TEXAS**

FILED
COURT OF CRIMINAL APPEALS
5/9/2018
DEANA WILLIAMSON, CLERK

DAVID ARROYO

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

Appellant's Brief on the Merits

From the

FOURTH COURT OF APPEALS, SAN ANTONIO, TEXAS

NO. 04-15-00595-CR

Appeal from Bexar County

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TABLE OF CONTENTS

NAMES OF ALL PARTIES.....	ii
LIST OF AUTHORITIES	
STATEMENT OF THE CASE.....	1
STATEMENT ON ORAL ARGUMENT.....	2
ISSUES PRESENTED.....	2
ISSUE ONE: In light of significant statutory changes, does <i>Nelson v. State</i> have continued validity when interpreting §21.11 of the Texas Penal Code.	
ISSUE TWO: Under §21.11 of the Texas Penal Code, what is a “breast”?	
STATEMENT OF FACTS.....	2
SUMMARY OF THE ARGUEMNT.....	3
ARGUMENT AND AUTHORITIES UNDER GROUND ONE.....	4
RELIANCE ON <i>NELSON’S</i> DEFINITION OF BREAST.....	9
PRAYER FOR RELIEF.....	13
CERTIFICATE OF SERVICE AND COMPLIANCE.....	14

IDENTITY OF THE PARTIES

The trial judge in the 399th Judicial District Court in Bexar County, Texas was the HONORABLE RAY OLIARRI.

The parties in this matter are:

1. DAVID ARROYO, defendant in the trial court and appellant in the Fourth Court of Appeals.
2. THE STATE OF TEXAS through the Bexar County District Attorney's Office prosecuted in the trial court, appellee in the Fourth Court of Appeals and petitioned this Honorable Court for review

Trial Attorneys:

1. Defendant, David Arroyo was represented by MONICA GUERRERO and ROCHELLE M. ACEVEDO, 5150 Broadway St., Suite 114, San Antonio, Texas 78209.
2. Prosecuting the case for Nicholas "Nico" LaHood, Bexar County District Attorney, were Assistant District Attorneys MEREDITH CHACON and GRANT BRYAN, Paul Elizondo Tower, 101 W. Neuva Street, Fourth Floor, San Antonio, Texas 78205

Appellate Attorneys in the Fourth Court of Appeals:

1. Appellant, David Arroyo was represented by ANDREA C. POLUNSKY, 111 Soledad, Suite 332, San Antonio, Texas 78205
2. The State of Texas, appellee was represented by NICHOLAS "NICO" LAHOOD, District Attorney, LAURA E. DURAN and ANDREW N. WARTHEN, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205

Appellate Attorneys in the Court of Criminal Appeals:

1. Appellant, David Arroyo is represented by DEBRA L. PARKER, 111 Soledad, Suite 300, San Antonio, Texas 78205
2. Appellee, the State of Texas is represented by NICHOLAS "NICO" LAHOOD, District Attorney and ANDREW N. WARTHEN, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205

LIST OF AUTHORITIES

U.S. Supreme Court Cases

<i>Jackson v. Virginia</i> , 442 U.S. 307 (1979).....	6
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Texas Statutes

Texas Government Code § 311.011.....	10
Texas Penal Code § 21.11.....	2, 4, 5, 7, 8, 11, 12
Texas Rules of Appellate Procedure 74.....	1
Texas Rules of Appellate Procedure 200 <i>et.seq</i>	1

Texas Cases

<i>Cary v. State</i> , 507 S.W.3d 750 (Tex. Crim. App. 2016).....	11
<i>Chambers v. State</i> , 502 S.W.3d 891 (Tex. App—Texarkana 2016).....	13
<i>Clark v. State</i> , 558 S.W.2d 887 (Tex. Crim. App 1977).....	11
<i>Harris v. State</i> , 359 S.W. 3d 625 (Tex. Crim. App. 2011).....	10
<i>Isassi v. State</i> , 330 S.W.3d 622 (Tex. Crim. App. 2010).....	6
<i>Lopez v. State</i> , 253 S.W.3d 680 (Tex. Crim. App. 2008).....	10
<i>Merritt v. State</i> , 368 S.W.3d 516.....	6, 7
<i>Nelson v. State</i> , 505 S.W.3d 551 (Tex. Crim. App. 1974).....	4, <i>passim</i>

Other Sources

http://www.livescience.com/4971-menbreasts.html	12
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https://www.mayoclinic.org/diseases-conditions/male-breast-cancer/symptoms-causes	12
<i>Mirriam-Webster's Medical Dictionary</i> (2 nd Printing August 2017).....	8
www.lexic.us/definition-of/chest	7

**TO THE HONORABLE JUDGE OF THE COURT OF CRIMINAL
APPEALS:**

NOW COMES, David Arroyo, Appellant in this cause, by and through his attorney of record, Debra L. Parker and pursuant to the provisions of Tex.R.App.Pro. 74 and 200 *et.seq.*, files this his Brief on the Merits, and would show the Court as follows:

STATEMENT OF THE CASE

David Arroyo was convicted of six counts of indecency with a child by a jury. (RR 5 45- 46) The jury assessed punishment at 20 years and a \$5,000.00 fine on each count. (RR 5 60) The State filed a motion to stack the sentences on all counts. (RR 5 62) The trial court judge elected to allow the sentences on County 1-5 to run concurrently and Count 6 to run consecutively to the prior Counts. (RR 5 63-64)

Arroyo appealed his convictions to the Fourth Court of Appeals which issued an opinion on May 24, 2017. The State requested a rehearing on July 19, 2017 which was overruled, the original opinion vacated and a new opinion was issued. *Arroyo v. State*, No. 04-15-00595-CR, 2017 Tex.App. LEXIS 6632 (Tex.App.—San Antonio July 19, 2017, pet.granted)(mem.op., not designated for

publication). The Fourth Court of Appeals opinion reversed Appellant's convictions on Counts 2, 4 and 6 determining the evidence was not sufficient to support convictions for touching the breast of the complainant. Appellant's remaining points of error for a violation of the confrontation clause and the trial court's failure to conduct a hearing pursuant to Texas Code of Criminal Procedure 38.072 were denied. The conviction was reversed and rendered in part and affirmed in part.

STATEMENT ON ORAL ARGUMENT

Oral argument was requested by the State and was granted.

ISSUES PRESENTED

ISSUE ONE: In light of significant statutory changes, does *Nelson v. State* have continued validity when interpreting §21.11 of the Texas Penal Code.

ISSUE TWO: Under §21.11 of the Texas Penal Code, what is a "breast"?

STATEMENT OF FACTS

A detailed account of the facts may be found at pp 8-11pf Appellee's brief.

During the testimony of K.E. and of G.S. the description of Appellant's actions never included the term "breast". The general term used was "chest" and

although questioned at length by the State the witnesses never uttered the more specific term which used in the statutory definition of sexual contact.

SUMMARY OF THE ARGUMENT

This Honorable Court should follow the principles of *stare decisis* and follow the prior holding in *Nelson v. State*. The statutory definition of “sexual contact” both in 2013 at the time of the indictment of Appellant and in 2017 used the term “breast” and does not include the term “chest”. The offense of “indecent with a child” criminalizes the conduct of sexual contact with a child which under the definition includes touching the breast. The term “chest” can include the “breast” but is not exclusively used to identify the breast. The “chest” includes the part of the human body enclosed by the ribs and sternum. Touching parts of the “chest” such as the collarbone or sternum is not the offense of Indecency with a Child. Use of the term “chest” is not specific enough to prove the offense for which Appellant was convicted in Counts 2, 4, and 6 of the indictment. The testimony of the witnesses failed to prove an element of the offense as set out in the statute and statutory definition. The offense of Indecency with a Child did not discriminate whether the sexual contact occurred with a male or female child.

GROUND FOR REVIEW ONE RESTATED

ISSUE ONE: In light of significant statutory changes, does *Nelson v. State* have continued validity when interpreting §21.11 of the Texas Penal Code.

ARGUMENT AND AUTHORITIES UNDER GROUND ONE

- 1. The evidence is not sufficient to uphold a conviction under §21.11 of the Texas Penal Code as found by the Fourth Court of Appeals when the testimony indicates the Appellant touched the “chest” and not the “breast” as charged in the indictment.**

- a. Section 21.11 and the memorandum opinion of the Fourth Court of Appeals

The Fourth Court of Appeals reversed Appellant’s convictions on Counts 2, 4, and 6 of the indictment. These three counts charged Appellant with touching the breast of the victim in violation of Texas Penal Code §21.11(c)(1) (West 2011) This reversal resulted in judgments of acquittal on the three counts. *Arroyo*, 2017 Tex.App. LEXIS 4684, at *8-9, 14.

- b. *Nelson v. State*

Nelson was convicted under the Revised Civil Statutes article 535d §1 of intentionally placing his hands on the breast of a female under the age of fourteen (14) years. The testimony of his nine year old daughter was that he had rubbed her chest. *Nelson v. State*, 5-5 S.W.2d 551 (Tex. Crim. App. 1974) The Court of Criminal Appeals looked to the definitions of “chest” and “breast” in determining

that the definition of “chest” is much broader than the definition of “breast” and includes more of the body than “breast”. *Id.* at 551. The court held that use of the word “chest” was insufficient to identify the part of the body which was touched and did not prove the statutory language that Nelson had placed his hand against the breasts. *Id.* at 552.

Similarly, the Texas Penal Code in effect in 2013 Appellant was indicted defines “sexual contact” as:

“Sexual contact” means, except as provided by Section 21.11, any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

Texas Penal Code 21.11 Indecency with a Child expands the definition by adding:

In this section, “sexual contact” means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

- (1) Any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child

As in *Nelson*, the testimony that Appellant touched the victim’s “chest” is overbroad and fails to specifically identify the area of the body, required under the statutory definition and the statute to result in sexual contact and indecency with a child. The statutes are quite specific regarding the areas of the body of a child which, when touched to gratify sexual desire, constitute the offense of indecency

with a child. The testimony in Appellant's case failed to identify with specificity the exact area of the torso touched in order to convict Appellant of the offense of "touching the breast of K.E." as set out in the statute and the indictment.

In counts 1, 3, and 5 charging Appellant with indecency with a child by touching the genitals of the victim the State expressly elicited the testimony which tracked the indictment. The State asked the K.E. where Appellant touched her under her skirt and the response was: my vagina. RR 4-9, 65, 83. However, the State never asked for such specificity in questioning about the part of the torso touched in order to prove the element of the offense.

c. Standard of review – sufficiency of the evidence

When assessing a sufficiency of the evidence point of error the reviewing court must measure the evidence sustaining the verdict in the light most favorable to the verdict and determine whether based on the verdict and any sensible interpretations therefrom any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 442 U.S. 307, 319 (1979), *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) Assessment of the credibility and weight assigned to the witness testimony is the duty of the jury. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 20120)

When testimony that maintains differing interpretations the reviewing court must resolve the conflicts in support of the verdict. *Id.* at 525-26

d. Nelson should be upheld

Nelson stands for the standard that every element of the offense must be proven beyond a reasonable doubt. In order to prove sexual contact as alleged in Counts 2, 4, and 6 of the indictment the State must prove, beyond a reasonable doubt that the Appellant touched the victim's breast. The term "chest" includes many parts of the body. The exact synonyms are "pectus" and "thorax". The group relationships include "craniate", "vertebrate", "body", "torso" and "trunk". Terms included within the definition of chest are "Breastbone", "sternum", "thoracic aorta", "thoracic vein", "vena thoracica", "gall bladder", "area of cardiac dullness", "musculus pectoralis", "pecs", "pectoral", "pectoral muscle", "pectoralis", "chest cavity", "thoracic cavity", "breast" and "rib cage". www.lexic.us/definition-of/chest (Visited May 1, 2018) "Chest" encompasses vastly more of the body by definition than the term "breast". To say that "chest" means "breast" would be to say "pelvis" means "vagina" however, the general terms to denote the part of the body are inclusive of many parts and not descriptive enough to prove a violation of Texas Penal Code §21.11. Merriam-Webster's Medical Dictionary defines "chest" as "the part of the body enclosed by the ribs and sternum and defines "breast" as

“1. either of the pair of mammary glands extending from the front of the chest in pubescent and adult females; also, either of the analogous but rudimentary organs of the male chest esp. when enlarged 2: the fore or ventral part of the body between the neck and the abdomen.” *Mirriam-Webster’s Medical Dictionary* (2nd Printing August 2017) It behooves the State to elicit more specific testimony as to the exact body part, charged in the indictment and enumerated in the statutory definition such as in the questioning of K.E. set out below:

Q: And you said he was rubbing your leg and then he went up. Where did he go when he went up? Where did he touch?

A: My vagina underneath my shirt. RR 4 83

The answer provided by K.E. is specific, tracts the statute as there is no question that the “vagina” is “part of the genitals” as required by the statute. Tex. Penal Code § 21.01. The State is required to prove every element of the offense in order to sustain a conviction and not an approximation of the offense. Texas Penal Code §2.01 Had the State asked one more question, to clarify K.E.’s response to offer proof that tracked the statutory definition, the offense and the indictment the offense could have been proven. Tex. Penal Code §§21.01, 21.11 The testimony offered was that Appellant touched K.E. on some part of her body between her throat and waist which is not an offense under the statute. K.E.’s testimony was not

specific enough to determine what part of the general area of the chest was touched.

- e. The evidence in this case was not sufficient to support the verdicts in Counts 2, 4, and 6

The term “chest” is not specific enough to prove that Appellant touched the “breast” of K.E. The term “breast” is set out in the very definition of sexual contact and was used in the indictment. Where the contact can be with multiple areas such as the vagina and urethra, the legislature used the terms “any part of the genitals” but where the contact was required to be specific the legislature chose to use the language of the body part it intended. No one would assume if the testimony was that the contact was with the pelvis the contact would be with the genitals although the genitals are part of the pelvic area. Similarly, the chest is too broad of a term to show the offense of contact with the breast.

2. Reliance on *Nelson’s* definitions maintains the statutory requirement of Texas Penal Code § 2.01 that each element of the offense be proven beyond a reasonable doubt and failure to require so would lessen the burden of proof on the State.

Texas Penal Code §21.01 defines “sexual contact” by defining genitals broadly to include any part of the genitalia, however it fails to broaden the

definition of “breast” accordingly. *Nelson*’s definitions exactly fit the present statutory scheme of indecency with a child.

a. Standard of review – statutory construction

Statutory construction review is a question of law requiring de novo review. *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) When analyzing the statute the reviewing court looks to the intent of the legislation enacting the statute. *Id.* The text of the statute is examined under the normal rules of grammar and usage. *Id. Lopez v. State*, 253 S.W.3d 680, 985 (Tex. Crim. App. 2008) holds that a statute shall be construed in line with the plain meaning of the language unless the language is ambiguous or leads to a result the legislature could not have intended. Indeed, Texas Government Code Ann. § 311.011 Common and Technical Usage of Words requires (a) words and phrases shall be read in context and construed according to the rules of grammar and common usage; (b) words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed according.

As used in the definition of sexual contact the term breast has acquired a technical or particular meaning otherwise the legislators would have applied a generalized definition of the area of the chest as was given for the genitals in the statute.

If the language of the statute is plain, we will effectuate that plain language without resort to extra-textual sources. However, if an interpretation of the language would lead to absurd results or the language is ambiguous, then we may review extra-textual resources to discern the collective intent of the legislators that voted to pass the bill.

Cary v. State, 507 S.W.3d 750, 756 (Tex. Crim. App. 2016) The language of the statutory definitions of “sexual contact” is plain in its description of the specific and general body parts touched with the intent to arouse or gratify the sexual desire of a person. Tex. Penal Code §21.01(2). Similarly, the language of Texas Penal Code § 21.11(c)(2) is plain in setting out the offense against a child.

The language used by the witness must be sufficient to inform the trier of fact that sexual touching occurred and exactly what part of the body was touched. *Clark v. State*, 558 S.W.2d 887, 889 (Tex. Crim. App 1977). The absurd result would be to ignore the plain language of the statute and allow a conviction to stand based on an inaccurate description of the body part touched by Appellant.

b. It is now a crime to touch the “breast” of all children with the requisite intent

Throughout the legislative modifications of §21.11 since *Nelson* was decided the constant terminology used in the statute is the term “breast” regardless of whether the gender of the child is included or removed. It is a crime under the statute at the time *Nelson* was decided to touch the “breast” and it remains a crime to touch the “breast” under Tex. Penal Code §21.11.

c. Meaning of the word “breast” under § 21.11

The statute requires the individual touch the “breast” of a child with the requisite intent regardless of the gender of the child. The legislature has not changed the plain language of the statute. Men and boys have breasts. The human fetal plan begins as female and at six weeks, if the fetus has a Y chromosome, testosterone will begin to turn the sexual organs male. <http://www.livescience.com/4971-menbreasts.html> (Last visited May 7, 2018) Men develop breast cancer and not “chest” cancer. <https://www.mayoclinic.org/diseases-conditions/male-breast-cancer/symptoms-causes> (Last visited May 7, 2018). Therefore, the State’s assertion that a boy would never testify that someone touched his “breast” is absurd. A boy or a girl testifying would need to indicate the part of the body with sufficient specificity to indicate a violation of the statute.

The legislature consistently defines the offense as touching the breast and to allow the state to prove less than that would lessen the burden of proof. Boys and girls have breasts whether developed or not. If the legislature had intended a variety of definitions of the term “breast” it would be in the statute as demonstrated by the use of the broadening language for the genitals. The object of the statute is to protect children, however, when the testimony comes from an adult as in the instant case the language can and should specifically track the statute to prove

beyond a reasonable doubt that the offense was committed. *Chambers v. State*, 502 S.W.3d 891, 894 (Tex. App—Texarkana 2016 pet. ref'd) K.E. testified as an adult with adequate linguistic ability to accurately describe an event from the past. It is relevant that the area constituting the breast was touched and not another part of the chest and the testimony failed to accurately describe that. The court of appeals opinion should be upheld.

PRAYER FOR RELIEF

Counsel for Appellant prays that this Honorable Court UPHOLD the court of appeals regarding counts two, four and six.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Debra L. Parker, hereby certify that the total number of words in this brief is 2,917. I also certify that a true and correct copy of this brief was emailed to Assistant Criminal District Attorney Andrew N. Warthen at awarthen@bexar.org and to Stacey Soule, State Prosecuting Attorney, at Stacey.Soule@SPA.texas.gov, on this the 8th day of May, 2018.

A handwritten signature in blue ink, appearing to read "Debra L. Parker", is written over a horizontal line.

Debra L. Parker
Attorney for Appellant